83 - 1635

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JEROME S. WAGSHAL,
Petitioner,

v.

CROZER-CHESTER MEDICAL CENTER and
UNIVERSITY OF SOUTHERN CALIFORNIA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JEROME S. WAGSHAL, P.C.
3356 N Street, N.W.
Washington, D.C. 20007
(202) 338-2121
Pro Se

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QUESTIONS PRESENTED FOR REVIEW

1. Where a class action suit successfully achieves money benefits for the plaintiff class members, but there is no "common fund" out of which an attorney's fee can be awarded, may the court charge the benefiting class members pro rata with a reasonable attorney's fee payable by them directly to the attorney, even though the class members "were not named and consenting parties to a pre-litigation retainer agreement."

2. Where a class action suit successfully achieves money benefits for the plaintiff class members, but there is no "common fund" out of which an attorney's fee can be awarded, should the court at least award a reasonable attorney's fee payable by the named plaintiffs, parties to the action, who served as plaintiff class representatives, and who agreed to pay a fee in the event of success.

3. What are the appropriate criteria for appointment of a defendant class representative under Rule 23, Fed.R. Civ.P., and, specifically, are a declared unwillingness to serve and asserted small liability, when typical of all the putative class members, sufficient to justify refusal to certify a defendant class representative?

4. When an attorney representing a certified plaintiff class files a supplemental action for award of a reasonable fee after success in the original action, can the court's jurisdiction be grounded on the jurisdiction on which the original action was based?

5. In an action depending on diversity jurisdiction, can a court dismiss for want of a jurisdictional amount by a determination made *sua sponte*, without notice to the dismissed party, and after well into the litigation after most pretrial proceedings had been completed?

6. May a court dismiss a defendant in a diversity action after default has previously been entered against the defendant on liability?

PARTIES TO THE PROCEEDING

Jerome S. Wagshal, Esquire — petitioner herein, was the attorney representing the plaintiff class in National Association for Mental Health, Inc. v. Weinberger, 1812-73 (D.D.C.) (decided without opinion on February 7, 1974), hereinafter "the *NAMH* case".

Crozer-Chester Medical Center — one of the named plaintiffs in the *NAMH* case, and a benefiting class representative.

University of Southern California — one of the benefiting plaintiff class members in the *NAMH case.*

Benefiting plaintiff class members include most of the major institutions of learning in the United States, some foreign institutions and other domestic institutions, all of whom received HEW grants as a result of petitioner's efforts.

The United States Government has no direct interest in this petition, but appeared through the Attorney-General in the lower courts, by virtue of the fact that the Secretary of HEW and other government officials had been named defendants in the original *NAMH* case.

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OPINIONS BELOW

This petition seeks review of a decision by the Court of Appeals affirming a series of pretrial orders by the United States District Court for the District of Columbia, the combined effect of which was to deny Petitioner any fee award for his services as an attorney in successfully maintaining a class action for the release of unlawfully impounded HEW medical research and training grants.

The district court rulings are:

September 9, 1980 Memorandum and Order denying approval of proposed settlement. App. 29a.

August 25, 1981 Order, dismissing Renewed Petition for Attorney's Fees in the *NAMH* case. App. 25a.

August 25, 1981 Memorandum and Order, directing class determination in Petitioner's ancillary action, C.A. 77-215 (D.D.C.). App. 26a.

December 2, 1981 Memorandum denying class certification in Petitioner's ancillary action, C.A. 77-215 (D.D.C.). App. 23a.

January 22, 1981 Order *sua sponte* dismissing C.A. 77-215 (D.D.C.) for lack of jurisdiction. App. 22a.

February 25, 1982 Order denying Petitioner's motion for reconsideration. App. 21a.

The Court of Appeals opinion affirming these orders appears at App. 3a. It was entered September 27, 1983. On November 8, 1983, petition for rehearing was denied. App. 2a.

JURISDICTION

The Court of Appeals opinion was entered September 27, 1983. A timely Petition for Rehearing was denied by the Court of Appeals on November 8, 1983. App. 2a. On January 25, 1984 this Court, per Chief Justice Burger, extended the time for filing of a petition for writ of certiorari to and including April 6, 1984.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Nature of the Case

This is an action brought by Jerome S. Wagshal, Esquire (hereinafter "Petitioner") for the award of a reasonable attorney's fee for services rendered to named

plaintiffs and plaintiff class members in effecting the release of unlawfully impounded HEW medical research and training grant funds. That litigation was successful, and over four hundred million dollars were released as a result of Petitioner's efforts.

The action was brought as a class action with the lead plaintiff being the National Association for Mental Health (now renamed the Mental Health Association, and referred to herein as "NAMH"). Other organizations and natural persons joined as plaintiffs, some as representative groups, and others as potential grantees, and representatives of classes of potential grantees. All named plaintiffs signed formal, written retainer agreements with Petitioner agreeing that his expenses would be paid and a minimal overhead figure of $35 per hour worked on the litigation, with the explicit understanding that Petitioner would have an appropriate class action fee award in the event the litigation were successful.

Nevertheless, petitioner has been previously denied any fee award from the fund released by his efforts. Now, by the series of district court rulings for which review is now sought, petitioner is being also denied any award payable directly from the benefiting class members, including both named plaintiffs who served as class representatives and the class members themselves who received the released grant funds.

Course of Proceedings; Disposition Below

Briefly stated, the present proceeding involves two alternative attempts by Petitioner to obtain a fee award directly from the benefiting class representatives and members after his award from the released funds was overturned by court of appeals.

The original court of appeals proceeding took this course: After decision on the merits, *NAMH v. Weinberger,* C.A. 1812-73 (D.D.C. Feb. 7, 1974) (*NAMH I*), Petitioner applied for a fee award, based on his success in effecting release of over $444.5 million for mental health research and training grants. That application sought an award either from some unexpended grant funds or from the successful grant recipients. The district court awrded over $80,000.00 from the unexpended grant funds, but that award was overturned on appeal, the court of appeals indicating that grant funds could not be used for that purpose. *National Association for Mental Health, Inc. v. Weinberger,* 68 F.R.D. 387 (D.D.C. 1975), *rev'd mem. sub nom. National Association for Mental Health, Inc. v. Califano,* 561 F.2d 1021 (D.C. Cir. 1977) (*NAMH II*).

Petitioner, blocked from an award from the fund which he had had released, sought an award directly from the benefiting grant recipients-class members. To attempt to avoid a procedural misstep, petitioner proceeded on two parallel courses: (1) On February 4, 1977, he filed a new action against the present respondents, Crozer-Chester Medical Center (Crozer) and University of Southern California (USC). (C.A. 77-215 (D.D.C.) (the *Crozer* case). Jurisdiction was founded on 28 U.S.C. §1332(a) and jurisdiction was also asserted during that litigation as an ancillary proceeding to the original *NAMH I.* (2) Petitioner on July 14, 1978 filed a renewed application for a fee award payable directly from benefiting plaintiff class members in the original impoundment case. *National Association for Mental Health, Inc. v. Califano,* C.A. 1812-73 (D.D.C.). Throughout, Petitioner made it clear that he was seeking only one award, and proceeding in two ways to avoid possible procedural problems regarding the proper course to pursue. The district court consolidated these two applications on March 12, 1979.

The district court disposed of both applications by a series of rulings which denied Petitioner any award:

The Renewed Application in C.A. 1812-73

The district court denied this application on August 25, 1981. App. 25a It indicated in the accompanying memorandum that it had to have personal jurisdiction over the payees to award a fee payable directly by the plaintiff class members, and that although the plaintiff class had been certified in *NAM I* "for purposes of litgating the merits of the impoundment case," that certification "cannot secure *in personam* jurisdiction over the members of the class in order to secure a judgment against them for attorney's fees." App. 27a.

The *Crozer* case (C.A. 77-215 (D.D.C.))

The *Crozer* case took a longer course leading to the same result:

First the court refused to approved a proposed settlement by which the class members (defendant class members in this action) would be notified of the fee application, and given an opportunity to protest it, again basing its action on lack of personal jurisdiction over the putative defendant class members. App. 29a.

Second, it denied a motion to certify a defendant class, basing its decision on the ground that the two defendant-putative class representatives would not fairly protect the interests of the class, and, also, that "this court in any event does not have *in personam* jurisdiction over the class members." App. 23a.

This left only Crozer and USC as defendants. Meanwhile, Petitioner had obtained default against Crozer.

However, this default was swept aside by the final action in which the Court held *sua sponte* that it lacked jurisdiction because the amount in controvery as to these two defendants "does not exceed $10,000." App. 22a. This served to end the litigation in the district court.[1]

The court of appeals affirmed all these rulings. In briefest summary,

1. the court held that the renewed petition in the *NAMH* litigation was correctly dismissed because, said the court, the

> beneficiaries of the release of funds who were not parties to pre-litigation fee agreements could [never] be forced to share in the costs of prosecuting [the case] App. 11a.

and, again, that

> the beneficiaries of NAMH I who were not named and consenting parties to a prelitigation retainer agreement are not now subject to the *in personam* jurisdiction of the District Court. App. 14a.

According to the court,

> The courts are not empowered to enforce that which was never agreed to among the parties. App. 20a.

The court took no note of a substantial number of named plaintiffs, like Crozer, who had, in fact, agreed in writing

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[1]In other actions not now before the Court, the district court also dismissed the Commonwealth of Massachusetts on the ground of 11th Amendment immunity. That action was separately certified, affirmed by unpublished opinion, and and application for writ of certiorari was denied. *Wagshal v. Crozer-Chester Medical Center, et al.*, No. 82-1709, 51 U.S.L.W. 3866 (U.S. June 7, 1983).

with petitioner to pay a proportionate share of a fee award in the event of success.

2. The court also affirmed the refusal to certify a defendant class in *Crozer* based on the conclusion that both Crozer and USC were "unwilling to represent the defendant class because they have an insufficient financial stake in the outcome." App. 15a. The court did not consider whether any other potential class representative would have a significantly greater stake in the outcome, or whether its ruling was tantamount to a determination that no defendant class could ever be certified where all defendant class members had a small stake in the outcome and were unwilling to serve.

3. Finally, the court affirmed dismissal on jurisdictional amount of the two defendants, Crozer and USC, stating that this action was a proper exercise of the court's control over its docket, that a hearing on the issue was unnecessary before the action was taken, and that the district court was correct in ignoring the fact that a default had already been entered in the case of Crozer. App. 19a.

The court ended with the adjuration that

> it is within the attorney's power, at the *start* of a case, to settle the terms under which the litigation will be pursued. The courts are not empowered to enforce that which was never agreed to among the parties. Mr. Wagshal failed at the beginning of his efforts to attend to arrangements regarding his fees. (App. 20a, emphasis in original)

REASONS FOR GRANTING THE WRIT

This is a case in which long established and generally accepted principles governing class action fee awards have been disregarded or drastically altered so as, in practical effect, to nullify Rule 23, Fed.R.Civ.P. Although the district court's original award from grant funds was reversed, its findings as to the merits of Petitioner's entitlement to a fee have never been disputed and serve as a framework for consideration of the issues raised by this petition:

> In this action, Mr. Wagshal has conferred a very substantial benefit upon both the public and the class members. He succeeded in obtaining a judicial decree declaring illegal the huge impoundment of funds by the Executive Branch. For plaintiffs he obtained release over two fiscal years of almost half a billion dollars in grant funds. Many of the grantees never would have been able to run their programs or research projects without these funds. Of course, to a large extent, Mr. Wagshal did not, by his efforts create the amount of the benefit — Congress had decreed the amount of monies by appropriation and the judicial decree had the effect of releasing these funds in the amounts set by Congress. Nevertheless, the benefits conferred by this litigation were substantial.
>
> During the case on the merits Mr. Wagshal exhibited substantial legal skill in addressing the complex issues involved. The greatest skill and effort was devoted, in the court's opinion, to procedural issues, particularly the structuring of this Class Action with 33 named plaintiffs representing a wide spectrum of interests in the mental health and alcoholism fields . . . . [T]he court believes that many of the issues presented by the merits of this litigation were complex and dif-

ficult. Mr. Wagshal devoted himself tirelessly to prosecution of this action and served his clients well.[4]

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[4]The NAMH, the chief funding plaintiff, submitted the following comment regarding Mr. Wagshal's efforts:

> It is very much in the interest of NAMH that Mr. Wagshal's fee application be entertained and that he be awarded a generous fee, consistent with the extent of his work and the difficulty and magnitude of the task he had undertaken. NAMH considers that Mr. Wagshal gave it and the other named plaintiffs extraordinarily diligent representation, often working nearly around the clock, and left no stone unturned in a highly determined and thoroughly ethical pursuit of the success that finally came.

68 F.R.D. at 394. It is these efforts which will go essentially uncompensated unless the decision of the lower courts is reviewed.

There are three principal legal issues which merit review by this Court: (I) The denial of Petitioner's renewed application in the *NAMH* case for direct payment to him by the benefiting named plaintiffs and other benefiting class members; (II) The denial of class certification of a defendant class in the *Crozer* case; and (III) The propriety of the late dismissal of Crozer and USC on jurisdictional amount grounds. As to each of these, the court of appeals decision is in conflict with the decision of one or more other courts of appeals or has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the district court, as to call for an exercise of this Court's power of supervision. Rule 17(a), Rules of this Court.

Further, unless the result below is reversed, a serious impediment will have been created to the use of class actions by parties unable to pay advance fees and who are the victims of widespread illegality.

I.

DENIAL OF THE RENEWED APPLICATION BECAUSE OF ABSENCE OF PERSONAL JURISDICTION WAS CONTRARY TO ESTABLISHED CLASS ACTION DOCTRINE AND OVERLOOKED THE PERSONAL JURISDICTION WHICH THE DISTRICT COURT IN FACT HAD.

The issue which probably most strongly merits this Court's review is the lower courts' determination that a fee could not be awarded in the absence of *in personam* jurisdiction over the payer-class members and a retainer agreement between them and petitioner. See quotes at p. 6, *supra.* This holding sweeps away the fundamental basis of attorney fee administration under Rule 23, Fed.R.Civ.P. At least up to the time of this court of appeals decision, it had been established beyond reasonable dispute that, after successful conclusion of a class action, the attorney representing the class was entitled to a reasonable fee award to be made by the Court from which the attorney obtained the decree benefiting the class, and, further, that this award was to be made without any prior written retainer with the class members. This principle was inherent in *VanGemert v. Boeing Co.,* 444 U.S. 472. It had previously been held, reheld, and restated in a long and undeviating line of decisions by this Court of which the following are some of the more frequently cited: *Trustees v. Greenough,* 105 U.S. 527; *Central Railroad & Banking Co. v. Pettus,* 113 U.S. 116; *Sprague v. Ticonic National Bank,* 307 U.S. 161; and *Alyeska Pipeline Service Co. v. The Wilderness Society,* 421 U.S. 240 (referred to herein as *Trustees, Pettus, Sprague,* and *Alyeska,* respectively).

With such an apparently conclusive line of authority stretching from *Trustees* to *VanGemert,* petitioner has searched for some rationale which, although perhaps unstated, the lower courts may have relied upon to reject this

line of authority. The only possibility would seem to be that the lower courts felt this line of authority should not be followed because petitioner was seeking an award payable directly by the benefiting class members rather than from a common fund. If the lower courts did not have this distinction in mind then it would appear that they have simply defied a controlling line of authority enunciated by this Court, and that summary reversal is in order. However, even if this distinction was the basis of decisions below, it still is flatly contrary to controlling principles established by this Court, and therefore should be reviewed and overturned. The remainder of this section addresses this proposition.,

A. This Court Has Repeatedly Stated That If A Class Action Fee Cannot Be Taken From A Fund, It Should Be Paid By The Benefiting Class Members.

On two occasions this Court has stated in clear and unequivocal terms that class action fee awards should be paid by the benefiting class members as an alternative to payment from a fund. In *Alyeska,* 421 U.S. at 257, this Court reaffirmed:

> . . . the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his cost, including his attorney's fees, from the fund or property itself *or directly from the other parties enjoying the benefit. That rule has been consistently followed.* (Emphasis added)

In perhaps the most seminal of its class action decisions, this Court stated in *Trustees,* 105 U.S. at 532, that if the class benefactor "cannot be reimbursed out of the fund it-

self, the [class members] ought to contribute their due proportion. . . ." Although *Trustees* and *Alyeska* speak in terms of compensating the class representative, the same rule applies to the compensation of the attorney representing the class. See *Pettus, supra,* and the analysis of *Pettus* in *Lindy Bros. Builders, Inc. v. American R.&S.San. Corp.,* 487 F.2d 161, 165-166 (3rd Cir. 1973). The plain meaning as well as the context of both *Alyeska* and *Trustees* is contrary to any requirement that the benefiting class members had to before the court *in personam* or in any capacity other than as class members in order to be chargeable with a proportionate share of a fee award.

B. As A Practical Matter Neither Personal Jurisdiction Nor A Pre-Existing Retainer Is Possible With The Benefiting Class Members In Most Instances.

The lower courts' holding that Petitioner should have had a pre-existing retainer agreement with the class members in order to be entitled to compensation from them is fundamentally contrary to the concept of class aciton litigation. As this court stated in *Sprague, supra,* 307 U.S. at 166:

> That the party in a situation like the present neither purported to sue for a class nor formally established a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements of the kind for which the petitioner in this case appealed to the chancellor's discretion.

Furthermore, as a practical matter, the requirement that the benefiting class members appear *in personam* by a pre-existing retainer agreement in order to be liable for a fee

award means that compensation from the class would be impossible in those class actions where the identity of the class members cannot be known before decision. Here, for example, the identities of the successful grant recipients could not have been known until the litigation achieved a successful result of having the grant money released, and the grantees were selected. This was conceded by the Court of Appeals: "[T]he unnamed class members could not be determined at the outset of the litigation and therefore, they had no formal notice of the action or the fee agreement." App. 6a. This is not an unusual situation in class litigation. *See, e.g., Childs v. U.S. Board of Parole,* 167 U.S.App.D.C. 268, 511 F.2d 1270, 1276 (1974). In all such situations, requiring *in personam* jurisdiction over the class members and a pre-existing retainer agreement is tantamount to overruling the entire line of authority of which *VanGemert, supra,* is representative.

This is a particularly appropriate case in which to review this issue because this was not a case in which the class representative was merely a single, insignificant class member whose actions were unlikely to be known by other class members. Rather, there were thirty-three named plaintiffs, including not only NAMH, but also such other major organizations in the field as the American Psychiatric Association, American Nurses Association, American Psychological Association, the Association of Mental Health Administrators, and more than ten other similar umbrella organizations. There were also some seventeen potential grantee-plaintiffs of which Crozer was one. All these were parties to the litigation by a master retainer agreement negotiated directly and through the NAMH with petitioner. To require more as a condition of compensation after success, as the Court of Appeals did in

this case, is simply to withdraw Rule 23 from practical usage.

C. This Court Has Expressly Rejected *In Personam* Jurisdiction As The Jurisdictional Basis For Binding Absent Class Members.

In *VanGemert, supra,* this Court reaffirmed standard practice in class action litigation that once a class action litigation is successfully concluded, the entire class is chargeable with payment of a fee to the attorney conferring the benefit without any additional jurisdictional basis other than the original declaration of class status and notice to the class of the fee award application. The district court's ruling in this case that the original class certification was not sufficient for it to proceed in the fee award process by notice of class members was contrary to both *VanGemert* and this standard practice.

The key to the established class fee award process is notice to the class members and an opportunity for them to be heard. This was one of the steps in the procedure agreed to by the parties in the proposed settlement in this litigation, which settlement was rejected by the district court on the ground that it lacked *in personam* jurisdiction over the class members. App. 29a, 31a.

This Court's governing decisions on this point – that the district court may exercise jurisdiction over class members by adequate notice and without the accoutrements of *in personam* jurisdiction – are *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306; *Hansberry v. Lee,* 311 U.S. 32; and *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356. In *In re Gap Stores Securities Litigation,* 79 F.R.D. 283, 291 (N.D.Cal. 1978), the court expressly recognized that failing to follow the principle of

Mullane, Hansberry and *Supreme Tribe,* and imposing an *in personam* jurisdictional requirement would gut the entire class action process:

> Imposing such a requirement would completely undercut the broad purposes of the class action device – requiring personal jurisdiction over all the class members would in effect destroy the class action concept since by definition there could be no "absent" members.

Indeed, as the district court for the District of Columbia earlier observed, prior to the ruling in this case,

> Class actions are the only significant exception to the general rule that one is not bound by a judgment in personam in litigation to which he/she has not been made a party by service of process [citing *Mullane, Hansberry* and *Supreme Tribe, supra*]

United States v. Trucking Enterprsies, Inc., 72 F.R.D. 101, 105 (D.D.C. 1976).

The principle of *Mullane, Hansberry* and *Supreme Tribe* – that adequate notice is sufficient to exercise jurisdiction over class members and *in personam* jurisdiction is not required – is fully as applicable to fee award proceedings following successful class actions as it is to the litigation on the merits of class actions, *VenGemert, supra.* However, unless the court of appeals decision is reviewed by this Court and reversed, the principal of jurisdiction by notice would seem to have been revoked at least in the District of Columbia Circuit.

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[2]There appears to be a further conflict in the District of Columbia Circuit over whether there must be an entirely new class certified in the fee proceeding following success of a class action. See, *e.g., American Ass'n of Marriage and Family Counselors Inc. v. Brown,* 193

D. The Lower Courts Ignored The Fact That They Had *In Personam* Jurisdiction Over At Least Some Of The Benefiting Class Members Including Crozer.

Even if the *in personam* rule of the lower courts were accepted, the lower courts refused to consider the fact that a number of the plaintiffs were before the district court *in personam* and benefited from the litigation. As the court of appeals stated, there were some thirty-three named plaintiffs in the original *NAMH* litigation. App. ____. Most of these were potential grantees and received grants after the merits of the litigation were successfuly dealt with. Crozer was one of these.

This fact was repeatedly and forcefully called to the attention of the lower courts. *See, e.g.*, petitioner's initial brief in the court of appeals, p. 29, citing district court proceedings. Yet both courts failed to acknowledge this fact in connection with the dismissal of the renewed petition for award of a fee. Although a factual error may not be, by itself, sufficient grounds for this Court's grant of a writ of certiorari, this error appears on the face of the court of appeals opinion, since Crozer is identified as a party and beneficiary. *See, e.g.*, App. 8a. Thus allowing the court of appeals decision to stand unreviewed would preserve a precedent which in effect holds that no fee application can be entertained following a successful class action in which there is no fund from which to draw a fee award. Such a doctrine would in practical effect revoke part or all of Rule 23, depending on how broadly it is read.

* * *

U.S.App.D.C. 211, 214, 593 F.2d 1365, 1368 (1979), and discussion at App. 12a. However, the present ruling, requiring *in personam* jurisdiction goes beyond these requirements on that issue, and is a more extreme barrier to class action litigation.

In summary, this is an appropriate case in which this Court should either reaffirm or explain the principles of class action litigation fee awards as they apply to awards payable by benefiting class members rather than from a common fund.

II

REFUSAL TO CERTIFY A DEFENDANT CLASS MERITS REVIEW

The rejection of petitioner's renewed petition in the *NAMH* litigation was followed by rejection of petitioner's motion for defense class certification in the *Crozer* case, the alternative procedure adopted by petitioner in seeking a fee payable directly by the benefiting class members. Here, the lower courts did not focus on the need for *in personam* jurisdiction (though that doctrine, if correct, might have been as applicable in this setting as in the former), but, rather, predicated the rejection of class certification on the lack of a suitable class representative.

The affirmance by the court of appeals focused on two criteria: The unwillingness of Crozer and USC to serve as class representatives and their claimed insufficient financial stake in the outcome. App. 15a. As a result, with no class certified, Petitioner again was left with his equitable entitlement stripped of any means of realization.

So far as Petitioner is aware, this Court has not spoken on the issues of class litigation involving a defendant class as distinguished from a plaintiff class. Although Rule 23, Fed.R.Civ.P., clearly contemplates that defendant class litigation may be brought (*See, e.g.,* Rule 23(a) which provides that, "One or more members of a class may . . . be sued as representative parties . . . .") most class actions in-

volve plaintiff classes and the law as to defendants' classes is relatively sparse. This area is ripe for guidance by this Court, particularly in view of the conflicts created by the court of appeals decision.

The lower courts' determination conflicts with *Marcera v. Chinlund,* 595 F.2d 1231, 1239 (2nd Cir.), *vacated on other grounds sub nom., Lombard v. Marcera,* 442 U.S. 915 (1979), in which the court analyzed the practical realities of defendant classes, and demonstrated that willingness to serve is not a reasonable criterion on which to base a determination of class representation:

> In contrast with representatives of plaintiff classes, named defendants almost never choose their role as class champion – it is a potentially onerous one thrust upon them by their opponents . . . But courts must not readily accede to the wishes of named defendants in this area for to permit them to abdicate so easily would utterly vitiate the effectiveness of the defendant class action as an instrument of correcting widespread illegality.

To the same effect see *Research Corp. v. Pfister Associated Growers, Inc.,* 301 F.Supp. 497, 499 (N.D.Ind. 1969), *app. dismissed sub nom., Research Corp. v. Asgrow Seed Co.,* 425 F.2d 1059 (7th Cir. 1970); *In re Arthur Treacher's Franchise Litigation,* 92 F.R.D. 398, 425 (E.D.Pa. 1981); Note, Defendant Class Actions, 91 Harv.L.Rev. 630, 639. *See also, Appleton Electric Co. v. Advance-United Expressways,* 494 F.2d 126 (7th Cir. 1974).

Nor is an asserted low financial stake in itself a proper criterion for refusal to designate a defense class representative. The defense class representative, once designated, has no responsibility to look after others, but merely to continue to protect his own interests. As the Court noted in

Marcera v. Chinlund, supra, 595 F.2d at 1239, "It will often be true that merely by protecting his own interests, a named defendant will be protecting the class." The fact of a small financial stake held by the class representative defendant should not be determinative if no other defendant-potential defense class representative has a significantly greater stake. Furthermore, the notice requirement serves to protect dependent class members as it protects plaintiff class members. It is established class action doctrine that the class action device permits adjudication of a number of small interests at once, where adjudication of each individual small interest would, as a practical matter, be impossible. Here there was no determination as to whether any other potential class representative was better situated to assume the role; by simply refusing to designate the defendants USC and Crozer, without considering that there was no better alternative, the courts below made impossible a recovery to which petitioner was otherwise clearly entitled on equitable grounds.

In this case, the determination of inadequacy by USC and Crozer is open to obvious question on review. USC and Crozer first negotiated a settlement with petitioner. The fact of such a negotiation indicates capacity to serve as a class representative not lack of such capacity. *See, e.g., United States v. Trucking Employers, Inc.,* 72 F.R.D. 101, 107 (D.D.C. 1976), and *United States v. Trucking Employers, Inc.,* 75 F.R.D. 682, 687-688 (D.D.C. 1977). Perhaps even more convincing is the success which USC and Crozer have subsequently had in averting liability after the settlement plan was rejected by the district court. No defense class member could ask more of a class representative than USC and Crozer have achieved for themselves here. If Petitioner's award must depend on a certified defendant class, this is an ideal setting to consider the standards for certification of such a class.

III.

SUMMARY *SUA SPONTE* DISMISSAL OF USC AND CROZER MERITS REVIEW.

Petitioner respectfully suggests the appropriateness of review of the final action of the district court in *sua sponte,* without notice or hearing, dismissing the two defendants, USC and Crozer, on the ground of lack of jurisdictional amount. Such action raises three substantial questions meriting review by this Court. First, petitioner claimed below that jurisdiction in the *Crozer* case was also founded on the original jurisdiction in *NAMH,* and was a supplemental proceeding, as set forth in *Sprague, supra,* 307 U.S. at 170 ("we view the petition for reimbursement as an independent proceeding supplemental to the original proceeding. . . .") This point was not dealt with below, and is an important jurisdictional issue.

Second, the court of appeals' affirmance of this dismissal mid-way through the litigation on jurisdictional amount grounds conflicts with *Garza v. Rodrigues,* 559 F.2d 259 (5th Cir. 1977), *cert. denied,* 439 U.S. 877; as well as *Commercial Credit Corp. v. Lane,* 466 F.Supp. 1326, 1329 (M.D.Fla. 1979), relying *inter alia,* on *King v. Morton,* 172 U.S.App.D.C. 126, 520 F.2d 1140 (1975). These cases indicate that this determination should be made only at the beginning of the litigation.

Finally, the dismissal of USC and Crozer, particularly after default had been entered against it, without hearing or notice to Petitioner, violated fundamental due process requirements as repeatedly enunciated by this Court in such cases as *Armstrong v. Manzo,* 380 U.S. 545, 552; *Grannis v. Ordean,* 234 U.S. 385, 394; *Mathews v. Eldridge,* 424 U.S. 319, 333; and *Goldberg v. Kelly,* 397 U.S. 254, 267. Here, the violation of due process principle was even more

extreme because the district court affirmatively misled Petitioner as to its intended action, having stated that it was contemplating disposition by encouraging confession of judgment by the two defendants.

CONCLUSION

It was clearly the objective of the court of appeals to bring petitioner's "long quest for fees . . . to an unsuccessful end." App. 20a. That purpose was accomplished.

Perhaps nowhere in the annals of American jurisprudence has an attorney recovered so much money for plaintiff classes — almost a half billion dollars — and received no fee award for his efforts. The court of appeals noted, unsympathetically, Petitioner's "theme that the courts must have some way of getting to him his just due." *Id.* Petitioner continues to believe in this ideal, and bases this petition on it. Too many established class action principles have been overriden and ignored in the course of denying this deserved fee award for the matter not to merit a further careful review. Petitioner respectfully urges that this Court grant that review.

Respectfully submitted,

Jerome S. Wagshal
JEROME S. WAGSHAL, PC
3256 N St., N.W.
Washington, D.C. 20007

Petitioner pro se

April 6, 1984

APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. A-600

JEROME S. WAGSHAL,
Petitioner,

v.

CROZER-CHESTER MEDICAL CENTER, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 6, 1984.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 25th
day of January, 1984.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 82-1509 September Term, 1983

Jerome S. Wagshal Civil Action No. 77-00215
Appellant

v.

Crozer-Chester Medical Center, et al.

And Consolidated Case Nos. 82-1196,
82-1197 and 82-1278

BEFORE: Wilkey and Bork, Circuit Judges and
McGowan, Senior Circuit Judge

ORDER

On consideration of the Petition for Rehearing of Appellant, Jerome S. Wagshal, filed October 27, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

Per Curiam

For The Court:

GEROGE A. FISHER, CLERK

By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Bork did not participate in this Order.

4UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
Filed Nov 8 1983
George A. Fisher, Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1196

NATIONAL ASSOCIATION FOR MENTAL HEALTH, INC., et al.
JEROME S. WAGSHAL, APPELLANTS

v.

THE HONORABLE JOSEPH A. CALIFANO, individually and as SECRETARY OF HEALTH, EDUCATION AND WELFARE, et al.

No. 82-1197

JEROME S. WAGSHAL, APPELLANT

v.

CROZER-CHESTER MEDICAL CENTER, et al.

No. 82-1278

NATIONAL ASSOCIATION FOR MENTAL HEALTH, INC., et al., APPELLANTS

v.

HONORABLE JOSEPH A. CALIFANO, et al.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 82-1509

JEROME S. WAGSHAL, APPELLANT

v.

CROZER-CHESTER MEDICAL CENTER, et al.

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action Nos. 73-01812 & 77-00215

Argued January 18, 1983
Decided September 27, 1983

Judgment entered this date

Jerome S. Wagshal, for appellants.

John B. MaGee, of the Bar of the Supreme Court of the State of Washington, pro hac vice, by special leave of the Court, for appellees.

Robert L. Moore, II, was on the brief for appellee, the University of Southern California in No. 82-1197.

Hope S. Foster and *Mary Susan Philp*, were on the brief for appellee, Crozer-Chester Medical Center in No. 82-1197 and No. 82-1509.

Leonard Schaitman and *John S. Koppel*, Attorneys, Department of Justice, were on the brief for appellee, Secretary of Health and Human Services in Nos. 82-1196 and No. 82-1278.

Stephen S. Ostrach, entered an appearance for appellee, Commonwealth of Massachusetts in No. 82-1196 and No. 82-1197.

Before WILKEY and BORK,* *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MCGOWAN.

MCGOWAN, *Senior Circuit Judge*: For nearly nine years, Jerome S. Wagshal has tirelessly, but unsuccessfully, sought attorney's fees from the alleged beneficiaries of his efforts in securing the release of unlawfully impounded federal grant funds. In this appeal, Wagshal seeks reversal of various District Court determinations which, taken together, may finally foreclose Wagshal from litigating further his attorney's fees claims. For the reasons set forth below, we affirm the District Court's decision.

I

In early 1973 President Nixon ordered the impoundment of federal funds that Congress had appropriated for mental health and alcoholism research and training grants, alcoholism project grants, and alcoholism state formula grants.[1] In September 1973, the National Association for Mental Health, Inc. (NAMH) brought a class action against the Secretary of Health, Education and Welfare (the Secretary) and others to obtain the release of the grant funds impounded in the 1973 and 1974 fiscal years. NAMH, the principal funding plaintiff, brought the action on behalf of thirty-three named plaintiffs and several hundred unnamed class members. The class members in-

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* Judge Bork heard the oral argument, but did not participate in the disposition of these cases.

[1] The complaint alleged that the impoundment action unlawfully limited funding of grant programs governed by the Public Health Service Act, 42 U.S.C. §§ 241, 242a, the Community Mental Health Centers Act, 42 U.S.C. 2688j-2 (repealed in 1974) & 2688o (superseded in 1975), and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 42 U.S.C. §§ 4551, 4571, 4572 (§ 4572 repealed in 1981).

cluded the individuals, institutions, and states that were likely to benefit from the grants which were threatened by the impoundment action. NAMH engaged Wagshal to represent the plaintiff class for an hourly fee of $35 In addition, Wagshal and NAMH agreed that Wagshal would petition the District Court for a fee from the benefiting class members if he was successful in gaining the release of the impounded funds. The named plaintiffs had notice of the fee agreement, but the unnamed class members could not be determined at the outset of the litigation and, therefore, they had no formal notice of the action or the fee agreement. The District Court did not learn of the fee agreement until later.[2]

On February 7, 1974, the District Court held the impoundment illegal and ordered the Secretary to obligate the grant funds in accordance with the applicable statutes. *NAMH v. Weinberger*, No. 1812-73 (D. D.C. Feb. 7, 1974) (Findings of Fact and Conclusions of Law) (*NAMH I*). The District Court order released 1973 and 1974 fiscal year grant funds totalling $444,565,000. Wagshal filed an application for attorney's fees on September 4, 1974. In his fee application Wagshal notified the District Court for the first time of his attorney's fee agreement with NAMH. In accordance with the agreement, he asked the District Court to award him a reasonable attorney's fee for his work in the impoundment case. Wagshal requested that the court either order the defendants to pay the fee out of the unexpended *NAMH I* grant

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[2] Mr. Wagshal's retainer agreement with NAMH resulted in payment of $27,580.10 to Wagshal. *See* Reply Brief for Wagshal at 4. Wagshal's retainers in two related suits brought him $34,286, and the settlement of one of those cases, *National Association of Regional Medical Programs, Inc. v. Weinberger*, 396 F.Supp. 842 (D.D.C. 1975), *rev'd sub nom. National Association of Regional Medical Programs, Inc. v. Mathews*, 551 F.2d 340 (D.C.Cir. 1976), *cert. denied*, 431 U.S. 954 (1977), yielded another $84,430 to him. *See* Brief for the Secretary of Health and Human Services at 5.

funds or, in the alternative, that it order the benefiting class members to pay Wagshal directly.

Relying on its decision in *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 387 F.Supp. 991 (D. D.C. 1974), *rev'd sub nom. National Council of Community Mental Health Centers, Inc. v. Mathews*, 546 F.2d 1003 (D.C.Cir. 1976), *cert. denied*, 431 U.S. 954 (1977) (*NCCMHC*), the District Court held that Wagshal should be paid a fee from the unexpended grant funds under the Secretary's control. *National Association for Mental Health, Inc: v. Weinberger*, 68 F.R.D. 387, 390-91, 394 (D. D.C. 1975), *rev'd mem. sub nom. National Association for Mental Health, Inc. v. Califano*, 561 F.2d 1021 (D.C. Cir. 1977) (*NAMH II*). The District Court refused to exercise *in personam* jurisdiction over the individual members of the plaintiff class so as to order them to pay an attorney's fee directly to Wagshal. *NAMH II*, *supra*, 68 F.R.D. at 392. Distinguishing its decision in *National Association of Regional Medical Programs, Inc. v. Weinberger*, 396 F.Supp. 842 (D. D.C. 1975), *rev'd sub nom. National Association of Regional Medical Programs, Inc. v. Mathews*, 551 F.2d 340 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977) (*NARMP*), the District Court said that although "it might be within the bounds of due process for the court to order the . . . grantees to pay a fee directly to Mr. Wagshal," it would, in the exercise of its discretion, refuse to do so in Wagshal's case. *NAMH II*, *supra*, 68 F.R.D. at 392. In a footnote the court stated that it did not intend "to indicate any view on the merits of whether proper *in personam* jurisdiction ha[d] been obtained within the context of this fee proceeding," but noted that under "almost identical circumstances" it had held in *NCCMHC*, *supra*, that it had no *in personam* jurisdiction. *NAMH II*, *supra*, 68 F.R.D. at 392 n.3.

This court reversed the District Court without an accompanying opinion. *See NAMH II*, *supra*, 561 F.2d at

1021. In support of its *per curiam* judgment of reversal, this court noted its decisions in *NARMP*, *supra*, and *NCCMHC*, *supra*. In both *NARMP*, *supra*, 551 F.2d at 343-44, and *NCCMHC*, *supra*, 546 F.2d at 1007, this court held that unexpended grant funds were in the safe keeping of the public treasury, and that any payment of attorney's fees from those funds would be an award against the United States contrary to 28 U.S.C. § 2412 (1970) (current version at 28 U.S.C. § 2412(a) (Supp. V 1981)).[3] Thus, as in those cases, the District Court in *NAMH II* had no equitable jurisdiction to award attorney's fees in this case where the payment would come from the United States Government. *See NARMP*, *supra*, 551 F.2d at 344.

II

We now turn to Wagshal's most recent efforts to obtain a fee for his services in this impoundment case. On February 4, 1977, Wagshal sued Crozer-Chester Medical Center (Crozer), the National Council on Alcoholism Delaware Valley Area, Inc.[4], the University of Southern

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[3] Section 2412(a) provides:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, *but not including the fees and expenses of attorneys*, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

28 U.S.C. § 2412(a) (Supp. V 1981) (emphasis added).

[4] The complaint named the National Council on Alcoholism Delaware Valley Area, Inc. (Delaware Valley) as a defendant; however, mailed service of process was returned undelivered and Wagshal made no further attempt to join Delaware Val-

California (U.S.C.), and the Commonwealth of Massachusetts[5], individually and as named defendants representing a class of defendants described as "all persons and entities, other than citizens of the District of Columbia, who received funds released as a result of the successful litigation conducted by [Wagshal] in the NAMH action." *Wagshal v. Crozer Chester Medical Center*, No. 77-0215, at 3 (D. D.C. Feb. 4, 1977) (complaint). Wagshal sought a judgment that he was entitled "to the reasonable value of legal services rendered the defendants by him." *Id.* at 6. In addition to the direct action, Wagshal also filed a new application for attorney's fees in the original impoundment case. *National Association for Mental Health, Inc. v. Califano*, No. 1812-73 (D. D.C. July 14, 1978) (Renewal of Petition for Award of a Reasonable Attorney's Fee). The District Court consolidated the two cases on March 12, 1979.

In March 1980, Wagshal presented a proposed settlement plan to the District Court for its approval. U.S.C. had agreed to the plan, which provided for notice to the non-state beneficiaries of the *NAMH I* action, and an opportunity either to pay a prorated share of Wagshal's legal fee or to object to making such payment.

The District Court subsequently issued the four rulings to which Wagshal raises objections in this appeal. First, resolving the issue it had earlier left undecided, *see*

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ley as a named defendant. *See Wagshal v. Crozer Chester Medical Center*, No. 77-0215, at 3 (D. D.C. Nov. 6, 1981) (transcript of status call). The District Court dismissed Wagshal's claims against Delaware Valley on November 12, 1981.

[5] The District Court granted Massachusetts' motion to dismiss, and this court affirmed that ruling on appeal. *See Wagshal v. Crozer Chester Medical Center*, No. 77-215 (D. D.C. August 25, 1981) (order entering judgment on Massachusetts' motion to dismiss), *aff'd mem.*, 696 F.2d 133 (1982), *cert. denied*, 51 U.S.L.W. 3866 (U.S. June 7, 1983).

NAMH, *supra*, 68 F.R.D. at 392 & n.3, the District Court refused to approve the proposed settlement plan because

> these documents at the very least suggest that the court is exercising *in personam* jurisdiction over the class members, adjudicating their rights by compelling them to pay a stated sum unless they pursue the alternative course of objecting to that payment. The court does not have the jurisdiction required for such adjudication of rights.
>
> . . . .
>
> The court need cite no more authority for this proposition than that the listed class members have never appeared before it or in any way taken affirmative action within the scope of this court's authority. No counsel has appeared on their behalf. It would be manifestly unjust to hold that they may be required to take any action with respect to Mr. Wagshal's demand for fees solely because one member of the class, the University of Southern California, has acknowledged its debt to him and agreed to the proposed settlement.

Record Document (R.D.) No. B-41, at 2-3.[6]

Second, the District Court relied on its lack of personal jurisdiction when it later dismissed Wagshal's renewed petition for attorney's fees. The court said:

> Mr. Wagshal asserts that a class has already been certified in Civil Action No. 1812-73. That class, however, was certified for the purpose of litigating the merits of the impoundment case. Mr. Wagshal, by filing a Petition for Attorney's Fees in Civil Action No. 1812-73, cannot secure *in personam* jurisdiction over the members of the class in order to secure a judgment against them for attorney's fees.

R.D. No. B-51, at 2.

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[6] In this opinion, documents in the District Court record in No. 1812-73 are indicated by the letter "A" before the document number, those in the District Court record in No. 77-0215 are indicated by the letter "B".

Third, the District Court denied Wagshal's motion to certify a defendant class because it found that "Crozer-Chester and the University of Southern California will not fairly and adequately protect the interests of the class," and that "this court in any event does not have *in personam* jurisdiction over the class members." R.D. No. B-68, at 2.

After the District Court refused to certify the defendant class, only Crozer and Southern California remained as defendants in Wagshal's lawsuit. The District Court found that it lacked subject matter jurisdiction and dismissed the remainder of the case because "the amount in controversy insofar as the remaining defendants University of Southern California and Crozer-Chester Medical Center are concerned, does not exceed $10,000." R.D. No. B-70.[7]

III

A

The District Court's orders rejecting the proposed settlement and dismissing Wagshal's renewed petition for attorney's fees were clearly correct. In the numerous opinions that have concerned the impoundment cases which Mr. Wagshal successfully brought nearly a decade ago, this court and the District Court have repeatedly rejected the notion that beneficiaries of the release of funds who were not parties to pre-litigation fee agreements could ever be forced to share in the costs of prosecuting those actions. We wrote in *NCCMHC*, *supra*, of parties similarly situated to those of the proposed class here that "[t]hese benefitting class members were not parties to the retainer agreement and the district court was not aware at the time of certification that attorney's fees would be sought

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[7] Wagshal also appeals the District Court's orders denying reconsideration of certain motions. *See* R.D. Nos. B-55 & B-73 Although we do not address them individually, we have accorded them full consideration in reaching our decision.

from them. Wagshal made no reference to his fee arrangement in any of his original pleadings." *NCCMHC, supra*, 546 F.2d at 1006. Because of this, the court continued, "[t]he class members were only informally advised of the retainer provisions by the NCCMHC. No evidence that they agreed to or understood the implications of the agreement was submitted to the district court. None of the class members was ever given an opportunity to opt out of the litigation and none appeared by separate attorney in this fee application case." *Id.* All these considerations supported this court's agreement with the District Court that it "did not have the power to assess the fee against individual class members." *Id.* at 1005.

Similarly, in *NARMP, supra*, the conclusion was that the District Court "may not charge the individual class members with payment of the fee because it does not have jurisdiction over them due to their lack of adequate representation in the fee proceeding." *NARMP, supra*, 551 F.2d at 346.

The District Court, writing in the last of the original trio of impoundment-connected fee cases, *NAHM I, supra*, declined again to order beneficiaries to assume responsibility for Mr. Wagshal's fees. It cited with approval the conclusion of one commentator that "[t]o make [such beneficiaries] personally liable to pay lawyer's fees because rights had been conferred on them through the binding effect of a class action decree would enable the successful lawyers not merely to solicit but to conscript clients." Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv.L.Rev. 849, 919 (1975) (*cited with approval in NAHM II, supra*, 68 F.R.D. at 392). The District Court noted that it found this reasoning persuasive, but left open the door through which the present suit eventually passed by adding that "[w]hile it might be within the bounds of due process for the court to order Class 2 and Class 3 grantees to pay a fee directly

to Mr. Wagshal, the court declines to do so." *Id.* at 392. In the orders currently under review the District Court has made explicit that these beneficiaries cannot be ordered to make any payments to Mr. Wagshal as the court "does not have the jurisdiction required for such adjudication of rights." R.D. No. B-41, at 2. We agree.

Three times Mr. Wagshal has been told that the government cannot be made to pay his fees. In the course of those decisions he has also been told rather clearly that the courts would not enforce his fee claims on members of the beneficiary classes in those earlier proceedings whose connection to the litigation was at best remote and frequently unknowing. Now Mr. Wagshal has begun a second generation of actions for payment, actions which while more direct in their demands are no more defensible in their legal theory than were the earlier attempts. The District Court's rejection of the proposed settlement agreement and its dismissal of the renewed petition for fees were correct since approval of either would have ignored all of the above precedent designed at least in part to protect absent class members.

The conclusions of this court's earlier reviews of Mr. Wagshal's efforts to obtain payment from the beneficiaries were reinforced in *National Association of Farmworker Organizations v. Marshall*, 628 F.2d 23 (D.C. Cir. 1979). In that decision this Court summarized its earlier results by stating that "this court in *Community* and *Medical Programs* directed counsel to make pre-litigation arrangements for payment of fees, curbing *any* possibility that grant recipients should not be subjected to *in personam* jurisdiction or forced to defend their interests by retention of counsel." *Id.* at 27 (emphasis added). The equities that accompany the insistence on clear structuring of fee arrangements in class action suits are obvious. To hold otherwise would be to demand of members of a class of years-ago ended litigation that they now appear and defend against charges that they owe substantial sums of

money to a lawyer they had never known, much less hired. The simple cost of retaining counsel, as Southern California's lawyer has repeatedly pointed out, makes defense against such charges prohibitively costly. To ensure that Mr. Wagshal does not later return to our court with yet another alleged beneficiary of his earlier suits in tow, we emphasize the simple truth that the beneficiaries of *NAMH I* who were not named and consenting parties to a pre-litigation retainer agreement are not now subject to the *in personam* jurisdiction of the District Court.

B

Next we must consider orders of the District Court that went to maintenance of the entire action before it.

In both proceedings below, Wagshal sought attorney's fees from the *NAMH I* decision beneficiaries as a class. Defendant class actions are clearly authorized by Rule 23 of the Federal Rules of Civil Procedure. That rule states that "[o]ne or more members of a class may sue or *be sued* as representative parties on behalf of all . . ." Fed. R. Civ. P. 23(a) (emphasis added). The rule also sets out four prerequisites to a class action:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id. While all of these prerequisites must be met, this appeal focuses solely on the fourth prerequisite.[8]

In *NARMP*, *supra*, this court said: "Basic consideration of fairness require[s] that a court undertake a

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[8] The University of Southern California argues that the second and third prerequisites, Fed. R. Civ. P. 23(a)(2) & (3), have not been fulfilled, but in view of our determination of the adequacy of representation issue, we need not address those arguments.

stringent and continuing examination of the adequacy of representation by the named class representatives at all stages of the litigation where absent members will be bound by the court's judgment." *NARMP*, *supra*, 551 F.2d at 344-45. At all stages of the litigation the lack of adequate representation "denies [absentee class members] due process of law and prevents the court from assuming personal jurisdiction over the absentee members." *Id.* at 346. *See NCCMHC*, *supra*, 387 F.Supp. at 993-94 & 546 F.2d at 1008. Thus the central issue in this case is whether Crozer and U.S.C. would adequately represent the defendant class of federal grant beneficiaries. We believe that the named defendants would not have adequately represented the class defendants at the stages of litigation under review here. Therefore, we affirm the District Court's refusal to certify the defendant class.

In determining whether a named representative in a class action is "a fair and adequate representative" within the meaning of rule 23(a)(4) we have considered two principal requirements: "1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representatives must appear able to vigorously prosecute the interests of class through qualified counsel." *NARMP*, *supra*, 551 F.2d at 345. We need not apply the first requirement in this case because it is clear that Crozer and U.S.C. would not vigorously defend the interests of the unnamed class members.

We agree with the District Court that the defense of this class action should not rest with Crozer and U.S.C. They are unwilling to represent the defendant class because they have an insufficient financial stake in the outcome. Although the parties are not in agreement as to the exact attorney's fee that Wagshal is claiming from Crozer and U.S.C., the record indicates that their exposure is insufficient to motivate adequate represen-

tation of the defendant class. In a hearing before the District Court, Southern California said that its maximum exposure was under $1000, and Crozer stated that its exposure was $250.00. *See Wagshal v. Crozer-Chester Medical Center*, No. 77-0215, at 13 (D. D.C. Nov. 6, 1981) (transcript of status call) ("R.D. No. B-74"). When asked if the proffered amounts were accurate, Wagshal responded: "I don't recall, Your Honor, but those figures do not sound unreasonable." *Id.* at 13-14. In an affidavit submitted to the District Court, a representative of U.S.C. again stated that the school's liability, as represented by Wagshal, was "not more than $1,000." R.D. No. B-63 (attachment) (affidavit of Carl M. Franklin). Crozer's President submitted a similar affidavit in which he stated that "Wagshal has represented to the Crozer-Chester Medical Center that it is liable for its pro rata share of any fee payable to him, and that said share will not exceed $250.00." R.D. No. B-67 (attachment) (affidavit of James H. Loucks, M.D.).

U.S.C. stated before the District Court that it was "unwilling to expend the effort and funds necessary to defend itself in this action, let alone represent the interests of a large group." R.D. No. B-63, at 4. The school's position was supported by the affidavit of one of its administrators, who stated: "Due to the minimal amount of its alleged liability in this action, the University of Southern California does not intend to defend this action on behalf of itself or any others." R.D. No. B-63 (attachment) (affidavit of Carl M. Franklin). Crozer chose action over words in demonstrating its unwillingness to represent the class. It defaulted its defense by failing to respond to Wagshal's complaint in No. 77-215. Crozer later filed a motion in opposition to Wagshal's motion for class certification supported by the affidavit of its President, who stated: "Due to the minimal amount of its alleged liability in this action, the Crozer-Chester Medical Center does not intend to defend this action on behalf of itself or any others." R.D. No. B-67 (attach-

ment) (affidavit of James H. Loucks, M.D.). Both Crozer and Southern California maintain on appeal that they do not intend to defend this action due to their minimal financial exposure. *See* Brief for Crozer at 5; Brief for Southern California at 7. We believe that the named representatives' unwillingness to serve, when grounded on a clearly minimal financial stake in the outcome of the defendant class action, is a sufficient basis on which to deny certification of the defendant class due to the failure to meet rule 23(a)(4)'s requirement that the named party fairly and adequately represent the interests of the unnamed parties.

We agree with a recent statement by the Fifth Circuit that "[t]he adequacy requirement mandates an inquiry into the zeal and competence of the representative's counsel and into the willingness and ability of the representative to take an active role in and control the litigation and to protect the interests of absentees. . . ." *Horton v. Goose Creek Independent School District*, 677 F.2d 471, 488 (5th Cir. 1982) (citation omitted). The District Court conducted such an inquiry and found with excellent reason that these class representatives would not pass the adequacy test. "The decision to grant or deny certification is . . . initially committed to the sound discretion of the district judge, and the decision will not be overturned except for abuse of discretion." *Id.*, at 487. The District Court was well within its discretion in denying certification in this instance.

C

As a result of the District Court's determination that it lacked personal jurisdiction over the unnamed class members in the fee application proceedings and its later refusal to certify a defendant class, Crozer and Southern California were the only defendants remaining in the proceedings before the District Court. The District Court subject matter jurisdiction was premised on the diversity of citizenship between Wagshal and the remaining de-

fendants. *See* 28 U.S.C. § 1332 (1976). Such jurisdiction also requires that "the matter in controversy exceeds the sum or value of $10,000." *Id.* The District Court, following its hearing on November 6, 1981, and the submission of memoranda by all remaining parties, concluded that "based on the complete record in this diversity case and in the related case of *National Association of Regional Medical Programs, Inc. v. Weinberger*, 396 F.Supp. 842 (1975), *reversed* 551 F.2d 340 (1976) . . ." the amounts in controversy did not exceed $10,000. R.D. No. B-70. It accordingly dismissed the case for lack of jurisdiction.

"To dismiss a claim on jurisdictional amount grounds, the court must find to a legal certainty that plaintiff could not recover in excess of $10,000." *Love v. Budai*, 665 F.2d 1060, 1063 (D.C. Cir. 1980). Admissions made to the Court by Mr. Wagshal in the course of the hearing on November 6, 1981 and confirmed by defendants' counsel leave no doubt as to the correctness of the District Court's decision on this matter. R.D. No. B-74, at 13-14. Mr. Wagshal has since attempted to argue that the figures bandied about at the hearing—figures which never reached above an aggregate estimate of $1,250—were no more than old settlement offers. The context of those discussions clearly refutes this position. The Court directly inquired of Mr. Wagshal whether defendants' estimates of their maximum exposure were ~~correct.~~ Mr. Wagshal responded, "I don't recall, Your Honor, but those figures do not sound unreasonable." *Id.* This exchange, coupled with the District Court's long experience with this and related cases, provides the necessary certainty as to the amount in controversy. The standard of "legal certainty" is a high one, but we are satisfied that the record as a whole supports the District Court's conclusion here.

Mr. Wagshal also raises numerous objections to the manner in which the District Court disposed of this action. He argues that the Court's *sua sponte* decision to dismiss violated his due process rights. *See* Brief for

Wagshal at 36-37. We have considered these assertions and find them to be without merit.

The Supreme Court, in reviewing a *sua sponte* dismissal for lack of prosecution, commented that "the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing [does not] necessarily render such a dismissal void." *Link v. Wabash Railroad Co.*, 370 U.S. 626, 632, *reh'g denied*, 371 U.S. 873 (1962). The power of the District Court to maintain a steady surveillance of its own docket is undisputed. *See Burden v. Yates*, 644 F.2d 503 (5th Cir. 1981). The responsibility to assess cases for their jurisdictional adequacy is part of that power. "Because subject matter jurisdiction determines whether a court has power to act in a given case, a federal court . . . must raise the issue on its own motion where the parties fail to bring it to the court's attention." *Rice v. Rice Foundation*, 610 F.2d 471, 474 (7th Cir. 1979). Mr. Wagshal has been given many opportunities over the years to explain his position. The hearing on November 6, 1981 was only the most recent of many attempts he mounted to convince the District Court of the merits of his action. When following that hearing it became clear to the lower court that it lacked jurisdiction over the remaining defendants it was well within its discretion to act with dispatch to end the litigation. Had the court ordered yet another round of hearings and briefs it would have succeeded only in enlarging the already considerable expenditure of resources generated by this litigation.

Finally, Mr. Wagshal argues that the District Court's dismissal resulted in a forfeiture of an already entered default against Crozer. *See* Brief for Wagshal at 38-39. Once it became aware of its lack of jurisdiction in the matter, the District Court was correct in ignoring the default. That action was taken under the false impression of an adequate jurisdictional basis for the suit. When that basis was revealed as non-existent, the de-

fault itself was void as an action taken in excess of the District Court's power over those parties.

IV

Mr. Wagshal's long quest for fees from the previously unnamed but alleged beneficiaries of his efforts appears to have now come to an unsuccessful end. Throughout his papers and arguments there runs the theme that the courts must have some way of getting to him his just due. With this we cannot agree. As we have many times pointed out to him, it is within the attorney's power, at the *start* of a case, to settle the terms under which the litigation will be pursued. The courts are not empowered to enforce that which was never agreed to among the parties. Mr. Wagshal failed at the beginning of his efforts to attend to arrangements regarding his fees. We cannot alter that fact. The judgment of the District Court is accordingly affirmed.

It is so ordered.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEROME W. WAGSHAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	
CROZER-CHESTER MEDICAL CENTER, et al.,	)	No. 77-215
	)	
	)	
Defendants.	)	

ORDER

Upon consideration of the plaintiff's Motion for Reconsideration of Order and to Vacate Any Resulting Judgment, it is, by the court, this 25th day of February, 1982,

ORDERED that the aforesaid motion be, and the same hereby is, denied;

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

FILED
Feb 25 1982
James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEROME W. WAGSHAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	
CROZER-CHESTER MEDICAL CENTER, et al.,	)	No. 77-215
	)	
	)	
Defendants.	)	

ORDER

It appearing to the court based on the complete record in this diversity case and in the related case of *National Association of Regional Medical Programs, Inc. v. Weinberger,* 396 F. Supp. 842 (1975), *reversed* 551 F.2d 340 (1976) that the amount in controversy insofar as the remaining defendants University of Southern California and Crozer-Chester Medical Center are concerned, does not exceed $10,000, it is, by the court, this 22nd day of January, 1982,

ORDERED *sua sponte* that this case be, and the same hereby is, dismissed for lack of jurisdiction.

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

FILED
Jan 22 1982
James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEROME W. WAGSHAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	
CROZER-CHESTER MEDICAL CENTER, et al.,	)	No. 77-215
	)	
	)	
Defendants.	)	

MEMORANDUM

This matter is before the court upon the motion of the plaintiff for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure, and in the alternative, for certification of an interlocutory appeal under 28 U.S.C. 1292(b). The remaining defendants Crozer-Chester Medical Center and the University of Southern California have filed oppositions to the plaintiff's motion.

The University points out it is a private institution that did not participate in any respect in the impoundment litigation or attorneys fees litigation in Civil Action No. 1812-73 and is unable to fairly and adequately represent the interests of all the members of the defendant class.

The University also asserts that its liability exposure is so low that it is unwilling to expend the effort and funds necessary to defend itself in this action, let alone represent the interests of a large group. It further asserts that the plaintiff's action is merely a debt collection action against multiple parties and that the issues of law and fact and claims and defenses applicable to individual class members vary widely.

Crozer-Chester joins in the opposition to class certification on essentially the same grounds. After consideration of the motions and oppositions thereto, the court will deny the motion for class certification because the court finds that Crozer-Chester and the University of Southern California will not fairly and adequately protect the interests of the class.

The court further finds based upon the complete record in this case as set forth in the related matter of *National Association for Mental Health, et al. v. Califano, et al.*, Civil Action No. 1812-73, that this court in any event does not have in personam jurisdiction over the class members. *See National Council of Community Health Centers, Inc. v. Weinberger,* 387 F. Supp. 991, 3, 4 (1974); *National Association of Regional Medical Programs, Inc. v. Matthews,* 551 F.2d 340 (1976). Therefore, it is, by the court, this 2nd day of December, 1981,

ORDERED that the plaintiff's motion for class action certification under Rule 23, Fed. R. Civ. P., filed herein on October 21, 1981, is denied; and it is further

ORDERED that the plaintiff's motion for certification of this ruling pursuant to 28 U.S.C. §1292(b), filed herein on October 21, 1981, is denied.

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

FILED
Dec 2 1981
James F. Davey, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEROME W. WAGSHAL, Plaintiff, v. CROZER-CHESTER MEDICAL CENTER, et al., Defendants.	)	Civil Action No. 77-215
NATIONAL ASSOCIATION OF MENTAL HEALTH, et al., Plaintiffs, v. HONORABLE JOSEPH A. CALIFANO, et al., Defendants.	)	Civil Action No. 1812-73

ORDER

Upon consideration of the Renewed Petition for Attorney's Fees filed by Jerome S. Wagshal, Esquire in Civil Action No. 1812-73, the various oppositions thereto filed herein, and the entire record in this case, it is, by the court, this 25th day of August, 1981,

ORDERED that the aforesaid Renewed Petition be, and the same hereby is, denied.

FILED
Aug 25 1981
James F. Davey, Clerk

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEROME W. WAGSHAL, Plaintiff,	)	
v.	)	Civil Action
CROZER-CHESTER MEDICAL CENTER, et al., Defendants.	)	No. 77-215
NATIONAL ASSOCIATION OF MENTAL HEALTH, et al., Plaintiffs,	)	
v.	)	Civil Action
HONORABLE JOSEPH A. CALIFANO, et al., Defendants.	)	No. 1812-73

MEMORANDUM AND ORDER

On September 9, 1980, the court filed a Memorandum and Order in which it denied the plaintiff's Petition for the court's approval of a proposed settlement plan in these cases[1] stating that it lacked jurisdiction to approve the

[1]The couirt inadvertently failed to include in the caption of the Order the consolidated case of *National Association for Mental Health v. CValifano,* Civil Action No. 1812-73. The court's ruling, however, applies to both cases and the court will order that the caption of the order be amended to include Civil Action No. 1812-73.

plan. Thereafter, the plaintiff filed a Motion for Clarification and a request for Chambers Conference. At the request of the court, Mr. Wagshal on July 8, 1981 filed a further pleading styled Petitioner's Memorandum Regarding Issues For Certification Pursuant to 28 U.S.C. 1292(b). Thereafter, on August 10, 1981, the attorney for the University of Southern California wrote to the court stating the University's position in this matter. As pointed out in the University's letter, no proceeding has been conducted under Rule 23(c) and no order has been entered pursuant to that Rule in Civil Action No. 77-215. The defendant University has consistently acted solely in its own behalf and has refused to act on behalf of others.

Mr. Wagshal asserts that a class has already been certified in Civil Action No 1812-73. That class, however, was certified for the purpose of litigating the merits of the impoundment case. Mr. Wagshal, by filing a Petition for Attorney's Fees in Civil Action No. 1812-73, cannot secure *in personam* jurisdiction over the members of the class in order to secure a judgment against them for attorney's fees.

The issue in Civil Action No. 77-215 is whether Mr. Wagshal is entitled to a fee from the class named in that complaint.

The court has yet to determine whether a class is properly certifiable in Civil Action No. 77-215.

In separate Orders filed today, the court is (1) dismissing the renewed petition for attorney's fees filed in Civil Action No. 1812-73 and (2) entering judgment on the court's Order granting the motion to dismiss filed by defendant Commonwealth of Massachusetts in Civil Action No. 77-215.

The court will conduct a status call on September 3, 1981 at 9:30 a.m. to determine the future course of this litigation against the remaining defendants in Civil Action No. 77-215.

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

FILED
Aug 25 1981
James F. Davey, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEROME W. WAGSHAL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	
CROZER-CHESTER MEDICAL CENTER, et al.,	)	No. 77-215
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter comes before the court on the request of counsel Jerome S. Wagshal that the court sign and formally approve a settlement plan proposed by Mr. Wagshal. Mr. Wagshal is engaged in efforts to secure attorney's fees from a class of institutions for services rendered in gaining the release to them of federal funds. In connection with these efforts he has reached an agerement with one of the benefiting class members, the University of Southern California. This agreement provides for, among other things, proration of the proposed fee award among the class members. For the reasons below this court is persuaded that it may not formally approve the proposed settlement.

The plaintiff asks the court to approve a "Notice of Proposed Class Action Fee Petition Settlement," one paragraph of which provides as follows:

> 1. You are a member of the proposed settlement class in this action. Unless you object to the proposed settlement, you may be bound by the judgment of the Court in this matter.

He also asks the court to sign an Order requiring payment of attorney's fees by those listed class members who have "failed to object to said settlement."

This court is persuaded that in order to sign these documents it would have to have *in personam* jurisdiction over the institutions involved. Notwithstanding the fact that the above-quoted paragraph reads "may be bound" rather than "will be bound," these documents at the very least suggest that the court is exercising *in personam* jurisdiction over the class members, adjudicating their rights by compelling them to pay a stated sum unless they pursue the alternative course of objecting to that payment. The court does not have the jurisdiction required for such adjudication of rights.

Concerned about its apparent lack of jurisdiction to grant the requested relief, the court directed Mr. Wagshal to submit a memorandum addressing this issue. In his memorandum he cites a passage from this court's ruling in *National Ass'n For Mental Health, Inc. v. Weinberger,* 68 F.R.D. 387, 392 (D.D.C. 1972)•:

> While it might be within the bounds of due process for the court to order [certain] grantees [of released federal funds] to pay a fee directly to Mr. Wagshal, the court declines to do so.[3]

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[3]By the preceding statement in text, the court does not intend to indicate any view on the merits of whether proper *in personam* jurisdiction has been obtained within the context of this fee proceeding. The court notes that under almost identical circumstances the court in *National Council of Community Mental Health Centers, Inc. v. Weinberger,* [387 F. Supp. 991 (D.D.C. 9174) rev'd, 546 F.2d 1003 (D.C. Cir. 1977)] held that there was no *in personam* jurisdiction. Certain states have relied upon that holding and have noted further that most of the fee application memoranda never were served upon them. In light of the objections expressed at the July 17,1975 hear-

> ing, the *in personam* jurisdiction issue would present a very close question.

On the basis of this passage he says that the court left open the question of *in personam* jurisdiction. The court now closes that question, concluding necessarily that it does not have such jurisdiction.

The court need cite no more authority for this proposition than that the listed class members have never appeared before it or in any way taken affirmative action within the scope of this court's authority. No counsel has appeared on their behalf. It would be manifestly unjust to hold that they may be required to take any action with respect to Mr. Wagshal's demand for fees solely because one member of the class, the Univesity of Southern California, has acknowledged its debt to him and agreed to the proposed settlement. *Accord, National Council of Community Mental Health Centers, Inc. v. Weinberger, supra.*

The court makes no holding here with regard to the possible benefits Mr. Wagshal might have conferred on the members of the class in question. It simply holds that it lacks jurisdiction to approve the settlement proposal that he has submitted.

Therefore, it is, by the court, this 9th day of September, 1980,

ORDERED that the plaintiff's petition for the court's approval of a proposed settlement plan in this case be, and the same hereby is, denied.

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

FILED
Sep 9 1980
James F. Davey, Clerk